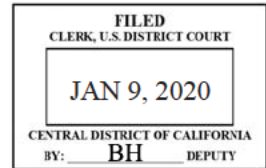


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6



John Burnell,

Plaintiff,

v.

Swift Transportation Co Inc et al,

Defendants.

5:10-cv-00809-VAP-OPx

**Order GRANTING IN PART
Plaintiffs' Motion for Order
Granting Final Approval of Class
Action Settlement
(Doc. No. 227).**

Before the Court is Plaintiffs' Motion for Final Approval of Class Action Settlement (the "Motion"). (Dkt. 227). After considering all papers filed in support of, and in opposition to, the Motion, the Court GRANTS IN PART the Motion.

I. BACKGROUND

On June 7, 2019, Gilbert Saucillo and James Rudsell ("Plaintiffs") filed their consolidated complaint¹ on behalf of a putative class of non-exempt truck drivers against Defendants Swift Transportation Co., Inc. and Swift Transportation Co. of Arizona, LLC ("Defendants"). (Dkt. 204). Plaintiffs brought the following claims: (1) recovery of unpaid minimum wages, (2) failure to provide meal and rest periods, (3) failure to indemnify, (4) failure to

¹ On June 7, 2019, after a stipulation by the parties, the Court consolidated this action, *John Burnell v. Swift Transportation Co Inc.*, et al., No. 5:10-cv-00809-VAP-OPx, with *James R. Rudsell v. Swift Transportation Company of Arizona LLC*, et al., No. 5:12-cv-00692-VAP-OPx (hereafter, "*Rudsell*"). (Dkt. 190).

1 furnish timely accurate itemized wage statements, (5) unlawful pay
2 instruments, (6) failure to pay timely all earned final wages, (7) unfair
3 competition, and (8) civil penalties. (*Id.*).
4
5

6 Discovery in this case included production of payroll documents,
7 Department of Transportation and other driver logs, and corporate policy
8 documents, as well as the depositions of several witnesses and the class
9 representatives. (Dkt. 197 at 14–15). The parties attended a day-long
10 mediation with mediator Mark Rudy on April 23, 2018, and although the
11 case did not settle then, the parties continued discussions and ultimately
12 arrived at an informal compromise that forms the basis for the settlement
13 now presented to the Court (the “Settlement Agreement”). (*Id.* at 16).
14

15 On July 30, 2019, the parties moved to certify the class conditionally
16 and approve preliminarily the Settlement Agreement. (Dkt. 197). The Court
17 granted preliminary settlement approval on August 16, 2019. (Dkt. 212).
18 The parties now move for final approval. (Dkt. 227).
19

20 The key terms of the Settlement Agreement are as follows.
21 Defendants will pay Plaintiffs a non-reversionary Gross Settlement Amount
22 of \$7,250,000. (Dkt. 227-1 at 12). Of this, class counsel will receive
23 \$2,416,666.67 (33.33%) in legal fees and \$67,551.61 in litigation expenses;
24 the named plaintiffs will each receive a \$5,000 incentive award; the
25 settlement administrator, ILYM Group, Inc., will receive \$100,000; \$375,000
26 will go to California’s Labor and Workforce Development Agency (“LWDA”)

1 under the Private Attorneys General Act ("PAGA"); and the Net Settlement
2 Amount of \$4,273,333.33 will be distributed to the settlement class
3 members, for an average award of \$217.50 per class member. (*Id.*).
4

5 II. LEGAL STANDARD

6 Under Rule 23(e) of the Federal Rules of Civil Procedure, "claims,
7 issues, or defenses of a certified class may be settled, voluntarily dismissed,
8 or compromised only with the court's approval." Fed. R. Civ. P. 23(e). A
9 court must engage in a two-step process to approve a proposed class
10 action settlement. First, the court must determine whether the proposed
11 settlement deserves preliminary approval. *Nat'l Rural Telecomms. Coop. v.*
12 *DirecTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). Second, after notice is
13 given to class members, the Court must determine whether final approval is
14 warranted. *Id.* A court should approve a settlement pursuant to Rule 23(e)
15 only if the settlement "is fundamentally fair, adequate and reasonable."
16 *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *accord*
17 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (citing
18 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).
19

20 In the Ninth Circuit, courts must balance the following factors to
21 determine whether a class action settlement is fair, adequate, and
22 reasonable: (1) the strength of the plaintiffs' case, (2) the risk, expense,
23 complexity, and likely duration of further litigation, (3) the risk of maintaining
24 class action status throughout the trial, (4) the amount offered in settlement,
25 (5) the extent of discovery completed and the stage of the proceedings, (6)
26 the experience and views of counsel, (7) the presence of a governmental

1 participant, and (8) the reaction of the class members to the proposed
 2 settlement. *Torrissi*, 8 F.3d at 1375; accord *Hanlon*, 150 F.3d at 1026. “In
 3 addition, the settlement may not be the product of collusion among the
 4 negotiating parties.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 458.

5
 6 “[S]trong judicial policy . . . favors settlements, particularly where
 7 complex class action litigation is concerned.” *Class Plaintiffs v. City of*
 8 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). In addition, “[t]he involvement
 9 of experienced class action counsel and the fact that the settlement
 10 agreement was reached in arm’s length negotiations, after relevant
 11 discovery had taken place create a presumption that the agreement is fair.”
 12 *Linney v. Cellular Alaska P’ship*, No. C-96-3008-DLJ, 1997 WL 450064, at
 13 *5 (N.D. Cal. July 18, 1997), *aff’d*, 151 F.3d 1234 (9th Cir. 1998).

14 15 III. DISCUSSION

16 A. Product of Serious, Informed, Non-Collusive Negotiations

17 As previously found by this Court, the parties engaged in arm’s-
 18 length, serious, informed, and non-collusive negotiations between
 19 experienced and knowledgeable counsel. (Dkt. 212 at 9). Additionally, the
 20 Settlement Agreement was reached after mediation with a neutral mediator,
 21 Mark Rudy. (*Id.*). The Settlement Agreement is therefore presumptively the
 22 product of a non-collusive, arms-length negotiation. See *Roe v. SFBSC*
 23 *Management, LLC*, No. 14-cv-03616-LB, 2017 WL 4073809, at *9 (N.D. Cal.
 24 Sept. 14, 2017) (holding that a settlement that is the product of an arm’s-
 25 length negotiation “conducted by capable and experienced counsel” is
 26 presumed to be fair and reasonable); *Satchell v. Fed. Express Corp.*, No.

03-cv-2878-SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.”). This factor weighs in favor of approval.

B. The Strength of the Plaintiff’s Case and Future Risks²

In assessing the strength of the case, the Court need not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of [the] outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir.1982). As to risk, the Court may “consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.” *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (citation omitted). “In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 525, 526 (C.D. Cal. 2004) (internal quotation marks omitted).

Plaintiffs describe at length the risks they would face in continuing to litigate their claims. (Dkt. 227-1 at 16–19). Several of those are shared by

² As the first three *Hanlon* factors—strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of future litigation; and the risk of maintaining class action status throughout the trial—are interrelated, the Court discusses them together here. *Hanlon*, 150 F.3d at 1026.

1 all class actions at this stage in their lifecycle: “(i) a denial of certification . . . ;
 2 (iii) the possibility of an unfavorable, or less favorable, result at trial on the
 3 class or PAGA claims; (iv) the possibility post-trial motions may result in an
 4 unfavorable, or less favorable, result at trial; and, (v) the possibility of an
 5 unfavorable, or less favorable result on appeal, and the certainty that
 6 process would be lengthy.” (*Id.* at 16–17).

7
 8 Plaintiffs also stress the particular challenges of this case, including
 9 complex and disputed facts and strong defenses raised by Defendants. As
 10 the parties note, this Court has denied class certification in several similar
 11 trucking cases, indicating that success on the merits was by no means
 12 certain. (*Id.* at 17). This lawsuit has lasted nearly a decade, and it
 13 continues to have “the potential to impose enormous litigation costs on all of
 14 the parties” going forward. (*Id.* at 18). Moreover, a 2018 regulatory
 15 determination by the Federal Motor Carrier Safety Administration—which
 16 determination is currently on appeal—held that federal law preempts the
 17 California law claims alleged by Plaintiffs, which could make the class’
 18 claims worth very little. (*Id.*). In sum, Plaintiffs face a “substantial risk of
 19 incurring the expense of a trial without any recovery.” *In re Toys R Us-Del.,*
 20 *Inc.-Fair & Accurate Cred. Trans. Act (FACTA) Litig.*, 295 F.R.D. 438, 451
 21 (C.D. Cal. 2014). This factor weighs in favor of approval.

22 23 **C. The Amount Offered in Settlement**

24 “To determine whether [a] settlement amount is reasonable, the Court
 25 must consider the amount obtained in recovery against the estimated value
 26 of the class claims if successfully litigated.” *Millan v. Cascade Water Servs.*

1 *Inc.*, 310 F.R.D. 593, 611 (E.D. Cal. 2015) (citing *Litty v. Merrill Lynch & Co.*,
 2 *Inc.*, No. CV-14-0425-PA, 2015 WL 4698475, at *9 (C.D. Cal. April 27, 2015)
 3 (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir.
 4 2000)). A proposed settlement may be fair, adequate, and reasonable even
 5 though greater recovery might be available to the class members at trial.
 6 See *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).
 7 "It is well-settled law that a cash settlement amounting to only a fraction of
 8 the potential recovery does not per se render the settlement inadequate or
 9 unfair." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th
 10 Cir.1982). Further, the Ninth Circuit has long deferred to the parties' private,
 11 consensual decisions. See *Hanlon*, 150 F.3d at 1027.

12
 13 In its preliminary order approving the Settlement Agreement, the
 14 Court noted the overall settlement amount of \$7,250,000 is within the range
 15 of reasonableness, albeit on the low end of what Plaintiffs estimate their
 16 claims could be worth (\$211,000,000). (Dkt. 212-1 at 15). This factor
 17 weighs in favor of approval.

18 19 **D. The Extent of Discovery Completed and the Stage of the** 20 **Proceedings**

21 This inquiry requires the Court to evaluate whether "the parties have
 22 sufficient information to make an informed decision about settlement."
 23 *Linney*, 151 F.3d at 1239. Where the parties have conducted extensive
 24 discovery, this factor favors final approval "because it suggests that the
 25 parties arrived at a compromise based on a full understanding of the legal
 26 and factual issues surrounding the case." *Nat'l Rural Telecomms. Coop.*,

221 F.R.D. at 527 (internal quotation marks omitted).

Here, the parties possessed enough information to make an informed decision about the Settlement Agreement. Plaintiffs state the case has been “heavily litigated, including extensive pre-certification discovery covering both liability and damages.” (Dkt. 197 at 14). Prior to mediation, the parties exchanged discovery on payroll, Department of Transportation and other driver logs, and corporate policy documents relating to compensation. (*Id.* at 14–15). Both sides also took depositions. (*Id.* at 15). Accordingly, this factor weighs in favor of approval.

E. The Experience and Views of Counsel

Since “[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation,” courts tend to give considerable weight to counsel’s opinion. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)). Additionally, counsel are typically better positioned than the Court to produce a fair settlement, given the amount of investigation and research they have conducted. See *id.*

Here, counsel for both sides represent they have ample experience litigating wage and hour law and class actions. (Dkt. 227-1 at 20). They state the Settlement Agreement “is fair, adequate, and reasonable and in the best interests of the Class” based on “the complexities of this case, the ever changing state of the law, . . . the uncertainties of the outcome of class

1 certification and further litigation, . . . a realistic assessment of the strengths
2 and weaknesses of their respective cases, extensive legal and factual
3 research, and substantial discovery.” (*Id.* at 20–21). The Court finds this
4 factor weighs in favor of approval.

6 **F. The Presence of a Governmental Participant**

7 There is no government participant in this action, but Plaintiffs brought
8 claims under California’s Private Attorneys General Act (“PAGA”) on behalf
9 of the state and affected employees. Under PAGA, the Labor and
10 Workforce Development Agency (the “LWDA”) is entitled to 75 percent of
11 any settlement of civil penalties awardable under the Labor Code. See Cal.
12 Labor Code § 2699(i).

13
14 The Settlement Agreement provides for a \$500,000 PAGA payment,
15 or roughly 6.9% of the Net Settlement Amount, \$375,000 of which will go to
16 the LWDA. (Dkt. 227-1 at 12). Although this is a significant penalty, it is
17 consistent with the PAGA’s purpose of “augmenting the state’s enforcement
18 capabilities, encouraging compliance with Labor Code provisions, and
19 deterring noncompliance.” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d
20 1110, 1135 (N.D. Cal. 2016) (citation omitted). Additionally, the parties state
21 they notified the LWDA of the terms of the Settlement, and the LWDA has
22 not objected. (Dkt. 225 at 14; see *Echavez v. Abercrombie & Fitch Co.*, No.
23 11-cv-09754-GAF, 2017 WL 3669607, at *3 (C.D. Cal. Mar. 23, 2017) (“The
24 Court infers LWDA’s non-response is tantamount to its consent to the
25 proposed settlement terms, namely the proposed PAGA penalty amount.
26 The primary purpose of PAGA, i.e., the empowerment of aggrieved

employees to act as private attorneys general to collect civil penalties from their employers for Labor Code violations, is served by the proposed PAGA penalty in the parties' settlement agreement."); *Jordan v. NCI Grp., Inc.*, No. 16-cv-1701-JVS-SPx, 2018 WL 1409590, at *3 (C.D. Cal. Jan. 5, 2018) ("[T]he Court finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and no comment or objection has been received.")). This factor weighs in favor of approval.

G. The Reaction of The Class Members to the Proposed Settlement

Following preliminary approval of the settlement by the Court, the settlement administrator mailed a notice of pending settlement (the "Notice") to each of the 19,544 identified class members. (Dkt. 219 ¶¶ 3–7). The Notice explains in plain language what the case is about, what the recipient is entitled to, and the options available to the recipient in connection with this case, as well as the consequences of each option. (*Id.*, Ex. A.). During the allotted response period, the settlement administrator received eleven requests for exclusion from the settlement and four objections. (*Id.* at ¶ 11; Dkt. 227-1 at 21). The administrator deemed 339 Notices undeliverable. (Dkt. 219 ¶¶ 8–10). As a result, a total of 19,194 class members (98.2% of the class) will participate in the Settlement Agreement.

"[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms . . . are favorable to the class members." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529. "The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re*

1 *Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008) (citation omitted).
 2 Although “[n]o particular standard governs judicial review of objections,”
 3 courts evaluate objections in the course of “determining whether the
 4 settlement meets Rule 23’s fairness standard.” 4 W. Rubenstein, Newberg
 5 on Class Actions § 13:35 (5th ed. 2012). “[T]he trial court has some
 6 obligation to consider objections but is given significant leeway in resolving
 7 them.” *Id.*

8
 9 Here, only eleven class members—a fraction of one percent of the
 10 class—opted out of the Settlement Agreement.³ (See Dkt. 219 ¶ 11). Such
 11 a low number favors approval. Four class members have lodged
 12 objections, which the Court has read and considered. (See Dkts. 213, 216,
 13 217, 218). The parties have also filed responses to each objection. (Dkts.
 14 221, 222, 225). The Court finds the objections unpersuasive and discusses
 15 each in turn.

16
 17 Sadashiv Mares argues the Gross Settlement is inadequate for
 18 several reasons, the common theme of which is that he believes the parties’
 19 estimate of Defendants’ maximum possible exposure is too low. (Dkt. 218).

20
 21 ³ Two other class members, James Arias and Antonio Williams, filed late requests
 22 for exclusion from the Settlement Agreement. (Dkts. 233, 233-1, 233-2). They
 23 contend they did not receive the Notice and, if they had, would have opted out.
 24 (*Id.*). Federal Rule of Civil Procedure 5(b)(2)(C) states service may be effected by
 25 “mailing [a notice] to the person’s last known address—in which event, service is
 26 complete upon mailing.” According to documents provided by the attorney for Mrs.
 Arias and Williams, the settlement administrator mailed copies of the Notice to the
 correct and current addresses for both of his clients (see Dkt. 233 at 3, 15, 40).
 Mrs. Arias and Williams have offered no evidence “to overcome Rule 5(b)’s pre-
 sumption of service,” *McElyea v. Attorney Gen. of Arizona*, 457 F. App’x 646, 647
 n. 3 (9th Cir. 2011), and, accordingly, the Court denies their request for exclusion.

1 The Court addressed Mares's concerns before granting preliminary
2 approval of the Settlement Agreement and, as discussed above as well as
3 in its prior order, finds the Gross Settlement Amount fair and reasonable.
4 (See Dkt. 212 at 13). Mares asserts that the parties' exposure estimates
5 are "unsupported" (Dkt. 218 at 2), but the parties proffer evidence that
6 directly contradicts his position (Dkt. 221). For instance, Defendants'
7 director of payroll Robin Rohwer states her review of corporate records
8 showed "that there were 847,503 weeks worked by Swift California
9 employee drivers earning mileage-based trip pay from March 22, 2006
10 through January 31, 2019." (Dkt 221 ¶ 4). Thus, Mares' argument that
11 estimating wage claim exposure based on a total of 850,000 workweeks is
12 "whimsical" is plainly wrong.

13
14 Anthony Blakely and James Herron make a limited objection,
15 requesting "that the Court carve out from the *Burnell* settlement unpaid,
16 meal and rest breaks, unreimbursed business expenses, and derivative
17 claims of hostlers, for the time during the *Burnell* settlement class period
18 these employees were hostlers." (Dkt. 216 at 4; see Dkt. 217). Blakely and
19 Herron are settlement class members who worked for Defendants as both
20 drivers and hostlers. (Dkt. 216-1 at 2; Dkt. 217-1 at 2). They contend the
21 Settlement Agreement would improperly extinguish claims of similarly-
22 situated class members for periods when such class members were
23 employed as hostlers rather than as drivers. (Dkt. 216 at 5, 7–8). There are
24 presently two class actions solely on behalf of hostlers under submission in
25 California district courts, and Blakely and Herron have both received notices
26 that they are part of those classes. (Dkt. 216-1 at 2; Dkt. 217-1 at 2). The

1 parties themselves disagree as to whether the Settlement Agreement
2 releases the claims of hostlers. (Dkt. 227-2 at 25–26). Defendants point
3 out, however, that the Settlement Agreement explicitly deals with *mileage-*
4 *based compensation*, and because hostlers can earn the same mileage-
5 based pay as fulltime over-the-road drivers while driving long-haul routes,
6 “hostler claims may be properly released to the extent the hostlers earned
7 mileage-based pay in any workweek.” (Dkt. 222 at 2–3). The Court agrees.

8
9 “A settlement agreement may preclude a party from bringing a related
10 claim in the future even though the claim was not presented and might not
11 have been presentable in the class action, but only where the released
12 claim is based on the identical factual predicate as that underlying the
13 claims in the settled class action.” *Hesse v. Sprint Corp.*, 598 F.3d 581, 590
14 (9th Cir. 2010) (internal quotation marks and citations omitted). With regard
15 to the remaining claims of hostlers, Defendants contend that the same facts
16 give rise to the claims of hostlers and other drivers (Dkt. 222 at 2–3),
17 whereas Blakely and Herron argue “the underlying claims [in *Burnell*] are
18 based on the facts applying to drivers only” (Dkt. 216 at 8). The “‘identical
19 factual predicate’ argument is a mixed question of law and fact,” *Hesse*, 598
20 F.3d at 590, and the record here is inadequate to determine whether
21 hostlers’ claims are properly included in the Settlement Agreement.
22 Moreover, courts are unwise to attempt to guess how their decisions will
23 affect future litigation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797,
24 805 (1985) (“[A] court adjudicating a dispute may not be able to
25 predetermine the res judicata effect of its own judgment . . .”); *Matsushita*
26 *Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J.,

1 concurring in part and dissenting in part) (“A court conducting an action
2 cannot predetermine the res judicata effect of the judgment; that effect can
3 be tested only in a subsequent action.”). The parties in the two hostler-only
4 cases have conducted significantly more discovery and motion practice and
5 are better positioned to test the preclusive effect of the Settlement
6 Agreement. (See Dkt. 216 at 4–5).

7
8 Finally, Lawrence Peck contends the class representatives lack
9 standing to settle the PAGA claim, as they allegedly failed to exhaust certain
10 administrative procedures before bringing the present lawsuit. (Dkt. 213 at
11 11). Peck’s standing argument is not well-taken, as “[f]ailure to exhaust
12 administrative remedies under the PAGA is an affirmative defense subject to
13 waiver” rather than a prerequisite to standing. See *Batson v. United Parcel*
14 *Serv., Inc.*, No. 12-CV-0839 BTM-JMA, 2012 WL 4482782, at *2 (S.D. Cal.
15 Sept. 27, 2012); *Alcantar v. Hobart Serv.*, No. 11-CV-1600 PSG, 2013 WL
16 228501, at *4 (C.D. Cal. Jan. 22, 2013). Peck also argues the PAGA
17 penalty provided by the Settlement Agreement is “unfair and inadequate.”
18 (Dkt. 213 at 11). The Court addresses the sufficiency of the PAGA award
19 above.

20
21 Accordingly, the Court finds this factor weighs in favor of approval.

22 23 **H. Balancing the Factors**

24 As all the relevant factors favor approval, the Court finds that the
25 proposed Settlement Agreement is fair, reasonable, and adequate and
26 GRANTS final approval of the Settlement Agreement.

I. Plaintiff's Motion for Attorneys' Fees

Notwithstanding an explicit agreement to shift attorneys' fees in a certified class action, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 941 (9th Cir. 2011).

Reasonable attorneys' fees are generally calculated by application of the lodestar method, which requires multiplying a reasonable hourly rate by the hours reasonably expended. See *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The Ninth Circuit has held that "the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295–96 (9th Cir.1994)). Here, Plaintiffs seeks to employ the percentage-of-the-fund method and request \$2,416,666.67, i.e., one-third of the Gross Settlement Amount, on behalf of Class Counsel. (Dkt. 227-1 at 23).

When using the percentage-of-the-fund method, "courts typically set a benchmark of 25% of the fund as a reasonable fee award and justify any increase or decrease from this amount based on circumstances in the record." *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 455 (E.D. Cal. 2013); see *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989). A court may adjust the percentage upward or downward based on (1) the results achieved; (2) the risks of litigation; (3) the skill

1 required and the quality of work; (4) the contingent nature of the fee; and (5)
2 the awards made in similar cases. *In re Omnivision Techs., Inc.*, 559 F.
3 Supp. 2d 1036, 1046 (N.D. Cal. 2008) (citing *Vizcaino*, 290 F.3d at 1048–
4 50). The Court addresses these factors below.

5
6
7 **1. Results Achieved**

8 “The overall result and benefit to the class from the litigation is the
9 most critical factor in granting a fee award.” *In re Omnivision Techs.*, 559 F.
10 Supp. 2d at 1046. After proposed attorneys’ fees and other deductions, the
11 Net Settlement Amount would be \$4,273,333.33, which translates to an
12 estimated average award of \$217.50 per class member. (Dkt. 227-1 at 12).
13 Class counsel argue that this is an excellent result given “the uncertainties
14 associated with continued litigation on Plaintiffs’ claims, and Defendants’
15 vigorous denials and affirmative defenses.” (*Id.* at 27). As discussed above,
16 Plaintiffs faced an uphill battle in prosecuting their case and the possibility of
17 no recovery at all. The Court has also repeatedly noted, however, that the
18 Gross Settlement Amount is at the low end of reasonable and a small
19 fraction (3.4%) of the claims’ potential value.

20
21 Upward departures from the benchmark typically require an
22 “exceptional” result, see *Monterrubio*, 291 F.R.D. at 456, and the Court finds
23 the result here does not justify such a departure. In explaining why the
24 settlement justifies above-benchmark attorneys’ fees, Plaintiffs merely note
25 the risks of further litigation. (Dkt. 227-1 at 27–28). Without more—and
26 Plaintiffs do not describe anything out of the ordinary—a recovery in that

1 range “simply do[es] not lead the Court to conclude that the result is
2 ‘exceptional,’” see *Monterrubio*, 291 F.R.D. at 456 (rejecting an application
3 for attorneys’ fees equal to 33.33% where recovery equaled 30% of the
4 defendants’ maximum liability exposure).

5 6 **2. Risks of Litigation**

7 Class Counsel assumed a measure of risk by representing Plaintiffs,
8 given that class certification was previously denied in this case and similar
9 lawsuits have failed to achieve certification or have lost on summary
10 judgment. (Dkt. 227-1 at 17, 26; see also *Vizcaino*, 290 F.3d at 1048
11 (finding case “risky” when, among other factors, plaintiffs lost twice in district
12 court and there was absence of supporting precedent)). In addition, the first
13 cases in this consolidated action are nine years old, meaning class counsel
14 bore a financial burden for longer than usual. The risk, however, is not
15 clearly the type of extreme risk that would merit a departure from the 25%
16 benchmark. See *Monterrubio*, 291 F.R.D. at 456–57 (finding case was not
17 “extremely risky” although it was questionable whether the class could be
18 certified, whether the plaintiff could prove an employer’s policies violated
19 labor code sections on a “knew or should have known” standard, and
20 whether plaintiff could overcome an “exhaustion defense”); *Hawthorne v.*
21 *Umpqua Bank*, No. CV 11-06700-JST, 2015 WL 1927342, at *5 (N.D. Cal.
22 Apr. 28, 2015) (holding the risk in a case did not merit an attorneys’ fees
23 award of 33% even though the class counsel “expended a significant
24 amount of time and effort litigating this case over the past three years and
25 undertook a major risk by taking it on a contingency basis.”). Accordingly,
26 this factor weighs only slightly in favor of an upward departure from the

1 benchmark.

2
3 **3. Contingent Nature of the Fees**

4 Class Counsel took this case on a contingent fee basis. The Ninth
5 Circuit “has suggested the distinction between a contingency arrangement
6 and a fixed fee arrangement alone does not merit an enhancement from the
7 benchmark.” *Richardson v. THD At-Home Servs., Inc.*, No. CV 14-0273-
8 BAM, 2016 WL 1366952, at *9 (E.D. Cal. Apr. 6, 2016) (citing *In re*
9 *Bluetooth*, 654 F.3d at 942 n.7); *see also* *Torrissi*, 8 F.3d at 1376 (noting that
10 there were “no special circumstances . . . which indicate the 25%
11 benchmark award is either too small or too large” even though class counsel
12 took the case on “double contingency”). Accordingly, the Court will treat this
13 factor as neutral.

14
15 **4. Skill and Quality of the Work**

16 Class Counsel contend that their “experience in class actions
17 weighed heavily in obtaining a benefit to each member of the Class.” (Dkt.
18 227-1 at 26). While the Court does not doubt Class Counsel are
19 experienced and skilled litigators, “this case is, quite simply, a garden-
20 variety wage and hour class action,” *see Monterrubio*, 291 F.R.D. at 457.
21 The legal issues presented were neither complex nor novel; motion practice
22 prior to settlement was substantial but within the ordinary course; and
23 Counsel have litigated class actions with similar claims and issues, *see*,
24 *e.g.*, *Cole v. CRST, Inc.*, 150 F. Supp. 3d 1163, 1165 (C.D. Cal. 2015). The
25 Court will treat this factor as neutral.
26

1 **5. Awards Made in Similar Cases**

2 As noted above, the Ninth Circuit has established a 25% benchmark
3 award for attorneys' fees. *Hanlon*, 150 F.3d at 1029. Class Counsel cite
4 several cases in which courts have awarded attorneys' fees at or above
5 33% of the total settlement fund. (Dkt. 227-1 at 30). While some of these
6 may be analogous to the present case, others are distinguishable. See,
7 e.g., *Taylor v. Shippers Transp. Express, Inc.*, No. 13-CV-02092-BRO-PLAx,
8 2015 WL 12658458, at *10 (C.D. Cal. May 14, 2015) (awarding 33.33% of
9 the settlement as attorneys' fees where plaintiffs recovered between 42%
10 and 65% of the estimated maximum sum that could be awarded at trial" and
11 approximately \$13,140.66 per class member).

12
13 Moreover, for every case involving an upward departure, there are
14 several to show that courts generally adhere to the Ninth Circuit's
15 benchmark when awarding fees in wage and hour class actions. See
16 *Brooks v. Life Care Centers of Am., Inc.*, No. SACV-12-00659-CJC (RNBx),
17 2015 WL 13298569, at *4 (C.D. Cal. 2015) ("Awarding the benchmark in
18 mine run of wage and hour cases appears to be standard in this District.");
19 *Bravo v. Gale Triangle, Inc.*, No. CV-16-03347-BRO (GJSx), 2017 WL
20 708766, at *16 (C.D. Cal. Feb. 16, 2017) (rejecting an upward departure
21 from the benchmark and noting that, "while some courts have found that an
22 upward adjustment is supported in wage and hour class action cases, other
23 courts have not, or have found that such adjustments are supported only
24 when the results are exceptional"); *Monterrubio*, 291 F.R.D. at 457–58
25 (rejecting the class counsel's request for a departure from the 25%
26 benchmark in what the court deemed "a garden-variety wage and hour class

1 action”). Class Counsel have not established that a departure is warranted
2 here. Accordingly, this factor weighs against departing from the 25%
3 benchmark.

4 5 **6. Lodestar Cross-Check**

6 “Courts may apply the lodestar method as a ‘cross-check’” on the
7 reasonableness of a percentage-based fee award.” *Bravo*, 2017 WL
8 708766 at *17 (citing *Vizcaino*, 290 F.3d at 1050). “[W]hile the primary basis
9 of the fee award remains the percentage method, the lodestar may provide
10 a useful perspective on the reasonableness of a given percentage award.”
11 *Vizcaino*, 290 F.3d at 1050.

12
13 The lodestar is “calculated by multiplying the number of hours the
14 prevailing party reasonably expended on the litigation by a reasonable
15 hourly rate.” *Morales v. City of San Rafael*, 96 F.3d, 359, 363 (9th Cir.
16 1996). “To inform and assist the court in the exercise of its discretion, the
17 burden is on the fee applicant to produce satisfactory evidence—in addition
18 to the attorney’s own affidavits—that the requested rates are in line with
19 those prevailing in the community for similar services by lawyers of
20 reasonably comparable skill, experience and reputation.” *Camacho v.*
21 *Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (quoting *Blum v.*
22 *Stenson*, 465 U.S. 886, 895 n.11 (1984)); *Roberts v. City and County of*
23 *Honolulu*, 2019 DJDAR 8807–08 (9th Cir. 2019). The “relevant community”
24 for purposes of the “prevailing market rate” is the “forum in which the district
25 court rests.” *Id.* at 979.

1 The Court has performed a limited review of Class Counsel's billing
2 reports. See *Schiller v. David's Bridal, Inc.*, No. CV-10-00616-AWI, 2012
3 WL 2117001, at *20 (E.D. Cal. June 11, 2012) ("Where the use of the
4 lodestar method is used as a cross-check to the percentage method, it can
5 be performed with a less exhaustive cataloguing and review of counsel's
6 hours."). Class Counsel have state they spent a total of 2,763.12 attorney
7 hours on this case, at hourly rates between \$800 and \$925, yielding a
8 lodestar total of \$2,164,347.83 in fees. (See Dkt. 227-2 ¶ 19; Dkt. 227-5 ¶
9 15; Dkt. 227-6 ¶ 9).

10
11 The hourly logs submitted in support of these fees contain multiple
12 instances of excessive billing, particularly in time billed for correspondence
13 and communication. For instance, logs submitted by Marlin & Saltzman,
14 LLP, contain vague, one-word entries such as "Communications," for which
15 Class Counsel billed thousands of dollars. (See, e.g., Dkt. 227-6 at 25). In
16 another instance, Mr. Hawkins billed 0.7 hours, or \$647.50 (more than three
17 times the average class member's recovery), on March 1, 2012 for receiving
18 a voicemail from his client and returning the call. (Dkt. 227-2 at 57). He
19 billed another 0.6 hours (\$555) on April 15, 2012 and 0.5 hours (\$462.50) on
20 August 10 for receiving and making status calls. (*Id.* at 58–59). The logs
21 also show billing for clerical tasks for which no attorney should charge his
22 client \$925 per hour. (See, e.g., *id.* at 74 (billing 1.3 hours, or \$1,202.50, for
23 "calendar," "scan docs and calendar, and "set up and confirm court call;
24 calendar"; Dkt. 227-6 at 21 (billing 0.75 hours, or \$562.50, for "pulling
25 docket items").
26

1 Even if Class Counsel were to update their lodestar figures to remove
2 improper charges, “[t]he fact that the lodestar significantly outpaces an
3 award based on the 25% benchmark” without more “is not a compelling
4 reason to depart from the Ninth Circuit’s benchmark, particularly absent
5 evidence of exceptional risk or difficulty.” *Brooks*, 2015 WL 13298569, at *5;
6 see also *Ridge v. Infinity Sales Grp., LLC*, No. CV 12-6985-GW (SHx), 2014
7 WL 12589629, at *8 (C.D. Cal. July 24, 2014) (noting that, “[g]enerally
8 speaking, this Court does not exceed the ... 25% benchmark” in “relatively
9 simple and straightforward” cases unless “there is some indication that
10 counsel performed exceptionally or in another unusual manner” and that
11 “[t]his remains true even though Plaintiff’s counsel indicates that the figure
12 he seeks is itself already a negative multiplier when a lodestar cross-check
13 is applied”); *Sandoval v. Tharaldson Employee Management, Inc.*, No.
14 EDCV 08-482-VAP (OPx), 2010 WL 2486346, at *9 (C.D. Cal. June 15,
15 2010) (rejecting a request to exceed the 25% benchmark because the
16 plaintiff did not “present[] evidence of unusual circumstances that justify a
17 departure from the Ninth Circuit’s benchmark” aside from arguing that the
18 lodestar exceeded the benchmark).

19 20 **7. Conclusion**

21 The totality of the benchmark departure factors does not weigh in
22 favor of an award above the 25% benchmark. In addition, the Court
23 declines to rely on Class Counsel’s lodestar calculation figures for the
24 reasons stated above.

25
26 The Court, therefore, finds that the facts of this case do not present

1 the type of “unusual circumstances” required to justify a departure from the
2 benchmark. *Grauly*, 866 F.2d at 272. The Court DENIES Class Counsel’s
3 application for attorneys’ fees equal to 33.33% of the settlement fund
4 (\$2,416,666.67) and APPROVES an attorneys’ fees award of 25% of the
5 settlement fund (\$1,812,500.00).

6 7 **J. Class Counsel Expenses**

8 Class Counsel seeks \$67,551.61 in reimbursement for costs. (Dkt.
9 227-1 at 12). They have submitted a detailed accounting as to those
10 expenses (Dkt. 227-2 at 78–79; 227-5 at 13–14; 227-6 at 39–56), which the
11 Court has reviewed line-by-line. Many of the requests are for excessive or
12 inappropriate expenses, or are insufficiently explained. The law firm of
13 Marlin and Saltzman, LLP, for example, requests \$500 for a “Facebook
14 Campaign,” and \$748.90 for investigative services to locate the named
15 plaintiff (their own client). (Dkt. 227-6). Counsel request \$740 for “witness
16 fees and mileage” for class representative Saucillo, with no explanation why
17 the class representatives should receive witness fees. (*Id.*). Counsel
18 submitted costs for filing fees as late as May 15, 2019, although no fees are
19 imposed in the District Court other than for filing an initial complaint. (*Id.*).
20

21 Class counsel also consistently opted for costlier services, including
22 spending thousands of dollars on couriers to deliver mandatory chambers
23 copies (the Court’s Standing Order specifies that courtesy copies may be
24 delivered the day after electronic filing, allowing for overnight rather than
25 same day delivery (see Dkt. 6 at 4)) and car services when traveling. There
26 is no explanation for Class Counsel’s hotel expenses in Agoura Hills and

1 Los Angeles, where the firm has its offices. (Dkt. 227-6). Finally, although
2 the Court does not reduce reimbursement for these costs, it notes Counsel
3 spent hundreds on FedEx service—rather than USPS, for instance—when
4 sending documents to and from the class representatives. (Dkt. 227-6).

5
6 The Court does not approve reimbursement for the items described
7 above. After subtracting inappropriate charges, the Courts awards Class
8 Counsel \$61,630.48 for expenses.

9
10 **K. Incentive Award**

11 Named plaintiffs “are eligible for reasonable incentive payments.”
12 *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Such awards “are
13 intended to compensate class representatives for work done on behalf of
14 the class, to make up for financial or reputational risk undertaken in bringing
15 the action, and, sometimes, to recognize their willingness to act as a private
16 attorney general.” *Rodriguez*, 563 F.3d at 958–59. “The district court must
17 evaluate [incentive] awards individually, using ‘relevant factors includ[ing]
18 the actions the plaintiff has taken to protect the interests of the class, the
19 degree to which the class has benefitted from those actions, . . . the amount
20 of time and effort the plaintiff expended in pursuing the litigation . . . and
21 reasonabl[e] fear[s of] workplace retaliation.” *Staton*, 327 F.3d at 977.
22 Courts may also consider: “1) the risk to the class representative in
23 commencing suit, both financial and otherwise; 2) the notoriety and personal
24 difficulties encountered by the class representative; 3) the amount of time
25 and effort spent by the class representative; 4) the duration of the litigation;
26 and 5) the personal benefit (or lack thereof) enjoyed by the class

1 representative as a result of the litigation.” *Van Vranken v. Atl. Richfield Co.*,
2 901 F. Supp. 294, 299 (N.D. Cal. 1995).

3
4 Here, Plaintiffs request that class representatives James Rudsell and
5 Gilbert Saucillo each receive an incentive payment of \$5,000.00. (Dkt. 227-
6 1 at 34). Rudsell and Saucillo submitted declarations describing their
7 involvement in the lawsuit and the risks of being the face of an employment
8 class action. (Dkts. 227-3, 227-4). The Court finds the proposed incentive
9 payment consistent with awards made in similar cases. *See Alberto v.*
10 *GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008) (“Courts have generally
11 found that \$5,000 incentive payments are reasonable.”); *Hillman v. Lexicon*
12 *Consulting, Inc.*, No. 16-cv-01186-VAP-SPx, 2017 WL 10434013, at *9 (C.D.
13 Cal. Oct. 12, 2017). Accordingly, the Court APPROVES incentive award
14 payments of \$5,000.00 for each named plaintiff.

15
16 **L. Settlement Administrator Costs**

17 Plaintiff requests the Court approve the reasonable costs of
18 administering the settlement, in an amount equal to \$100,000. (Dkt. 227-1 at
19 34). The settlement administrator was charged with administering the
20 settlement fund by, among other things, mailing the Notice to settlement
21 class members; receiving and tracking claim forms; receiving and tracking
22 opt outs and objections from nonparticipating class members; and
23 distributing payments to all participating class members. (Dkt. 219 at 2–4)
24 The Court finds the settlement administrator expenses reasonable and
25 APPROVES the reimbursement.
26

IV. CONCLUSION

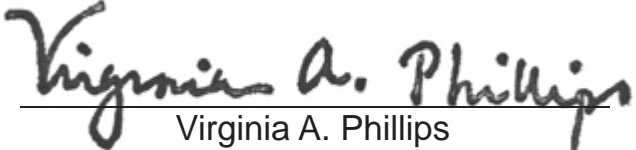
For the reasons stated above, the Court GRANTS the Motion for Final Approval of Class Settlement.

The Court GRANTS IN PART and DENIES IN PART the Motion for Approval of Award of Attorneys' Fees and Costs and Class Representative Enhancement. Class Counsel's request for attorneys' fees in the amount of \$2,416,666.67 is DENIED. Instead, the Court APPROVES attorneys' fees for Class Counsel of no more than \$1,812,500.00. The parties' request for a \$5,000.00 incentive payment to the named plaintiffs is GRANTED.

All other cost reimbursements are APPROVED as set forth above.

IT IS SO ORDERED.

Dated: 1/9/20


 Virginia A. Phillips
 Chief United States District Judge

United States District Court
 Central District of California